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SALES BY SAMPLE.

DEVIATION FROM CIVIL LAW.

The doctrine of the civil law that a vendor impliedly warrants that the thing sold by him has a certain quality, has been rejected by the common law. Its maxim is, as respects the quality, *caveat emptor.* If he wants a liability on the vendor's part, as to quality, let him stipulate for it. If he does not stipulate for it, the law will not furnish it. Reasons for this principle, stated by Gibson C.J.,[1] are (a) it is the common law; (b) it is more convenient and just. To like one's law because it is one's law, may seem very shrewd to a good patriot, but hardly to a jurist; and it is unnecessary to remark upon the ineptitude of such an observation. Why is the common law more "convenient?" Gibson's answer is, because instead of dealing with duties that are too subtle for judicial cognizance, the rule furnishes a plain test of the vendor's liability in two words, warranty or fraud. How is the duty too "subtle"? Does the justice mean that it is difficult to differentiate degrees of quality? So it is, but not more so than to do a hundred other tasks which courts have not declined. The courts will not refuse to enforce a warranty that the thing sold is sound, or good, but discrimination of quality, when there is an express warranty, is precisely the same process as it would be if the warranty were only implied. Besides it is not the convenience of the courts, so much as the accomplishment of justice, that ought to be their object. The common law rule, says the Chief-Justice, is better, "because it pretends not to release the vendee from his bargain, where it happens to be a bad one." But, the question is, what shall be understood to be the bargain? If the law says, a vendor

[1]Borrekins v. Bevan, 3 R. 23.

shall be understood unless he stipulates for exemption, to warrant the goodness of the thing sold, he soon learns that it does. The vendee also learns it, and therefore is dissuaded from obtaining an express warranty. When, under such a rule, he insists on obtaining a thing of good quality, he surely is not insisting on being released from his bargain, because it is a bad one. He entered, as did the vendor, into a bargain to which both knew that the law added a term, viz. a warranty. To insist on the execution of that term, is not to insist on an injustice. The language of the Chief Justice is deficient in meaning. Lowrie J., finds the further objection to a rule which too easily casts on the vendor a liability for quality, that it would foster a spirit of litigation by encouraging every man who is disappointed in the advantages expected from a bargain, "to drown his sorrows in the excitement of an action at law." He adds that there is "nothing on which people are more apt to differ and nothing on which they are less apt to trust each other" than representations of the quality of goods sold.[2] Men enter into bargains with the expectation that they will be kept, and judges are paid to increase, by their readiness to vindicate defeated expectations, the probability of a performance of contracts. If the judges caused a vendee to understood that when he was buying a thing he might expect a thing of good quality, or compensation for its being of bad quality, why should he not expect such compensation, when he was disappointed with respect to the quality? It is sometimes said that it would clog trade,[3] i.e. sales of goods, if the vendor were held to warrant quality. But how? If he will not sell, unless he is free from liability for quality, is it not equally true that the vendee will not buy, unless he can rely on the possession by the article of a certain quality? And if B will not buy from A, is it not true that A cannot sell to him? Besides it is always possible, even when the rule of the civil law obtains, for the vendor to stipulate that he assumes no liability for quality. The question between the systems is nothing more than the question shall the vendor have the trouble expressly to

[2]Wetherill v. Neilson, 20 Pa. 448.

[3]Gibson C.J., says trade is encouraged by preventing actions against all in turn through whose hands an article has passed, but it will be discouraged by giving an action, in sale by sample, or under a denomination, to the buyer, even for the failure of the thing to correspond in essential character, in species, in kind, with the sample or the denomination!!

require exemption from liability for quality or shall the vendee have the trouble expressly to require liability for quality.

THE USE OF A SAMPLE.

When a vendor, or a vendee, in his negotiation for the sale or purchase of a thing which is not present, and subject to the inspection and examination of the vendee, exhibits a sample, the sample may be intended to show the class or kind of thing or the qualities of the thing. The class or kind, it is rarely, if ever, necessary to manifest by a specimen. Classes have names, and the use of a name in negotiation as fully defines the class, as would that of a sample. If B orders from A a ham, or beef, or stockings, or shirting, or tobacco, he has already indicated the kind, individuals possessing which he is bargaining for. Why should a ham be exhibited, in order to inform the vendor or vendee, what *kind* of an object it is which they are bargaining about? But objects of certain kinds or classes may differ from each other infinitely with regard to various qualities. The ham might be large or small, cured by one process or another, sound or unsound, and the degrees of unsoundness are in number large. The words used by the parties might not be able to express the various qualities, and shades of qualities, which they intended the articles to possess, concerning the sale of which they were negotiating. A specimen would be highly useful, perhaps indispensable, to define these qualities. That the parties intended, in using it, to define these qualities would be a most reasonable supposition. Nevertheless, the judges of Pennsylvania have been the only persons in the Anglo-Saxon world, who refused to make this supposition. "In England, Canada, and in all of the United States, so far as is shown by reported decisions, except in Pennsylvania" says the American and English Encyclopedia of Law[4] "the rule is well settled that when a contract for the sale of goods is made by sample, it amounts to an undertaking, on the part of the seller, with the purchaser, that all the goods shall correspond in kind, character and quality, with those exhibited." The courts having disjoined Pennsylvania from the rest of the Anglo-American world, it was necessary for the legislature to restore its unity with the other kindred states and nations, as it did by the act of April 13th, 1887; P. L. 21.

[4] Vol. 15, p. 1225.

WHAT WARRANTY, IN SALE BY SAMPLE.

From the use of a sample, in effecting a contract to sell, although nothing is said concerning the correspondence between the thing to be delivered by the vendor to the vendee, and the sample, the courts in Pennsylvania, prior to 1887, implied a warranty by the vendor, that the thing that should be delivered should be of the same kind as the sample.[5] But what is a kind? An apple is a kind of fruit; so is a pear or a cherry. But, there are hundreds of varieties of apples known to connoisseurs, and even enumerated in the Standard Dictionary. There are American Golden Russet, Hocking, Rambo, Tulpehocken, etc. If the apples exhibited as samples are Rambos, is there a contract that those to be furnished shall be Rambos? Probably. Rogers, J., observed, "If a person purchase Madeira wine of a wine merchant, surely he cannot be compelled to take Teneriffe, Lisbon, Sherry, or Malaga."[6] He mentions a diamond as different in kind from a piece of glass; and jalop from cream of tartar. As wines are divisible into Sherry, and Malaga, etc., so Sherry is divisible into sub-classes, by virtue of certain qualities. Fruit is divisible into pears, apples, plums, peaches. Apples are again divisible into Rambo, Tulpehocken, etc. All Rambos are not the same in size or shape, and differences of flavor, and hardness, etc., can be observed between them. The same apple may be in different states at different times; when it is green, when ripe, when overripe. Is the green Rambo apple a different kind from the ripe? or the rotten? We are told by Clark, J., that a sound apple and the same apple rotten, "are articles entirely different in kind," and sound, unpared evaporated peaches, are different in kind, from the same peaches, when they have lost the quality of soundness, and have become so mouldy and decayed as to be unmerchantable as such."[7] When certain objects in certain states, have acquired a certain denomination under which they are sold, they have probably come to form a "kind." If articles are sold as "apples," the understanding is that they

[5]Boyd v. Wilson, 83 Pa. 319; Shaw v. Fleming, 174 Pa. 52; Sims v. Striblen, 16 Phila. 9; Selser, v. Roberts, 105 Pa. 242; Borrekins v. Bevan, 3 R. 23; Fraley v. Bispham, 10 Phila. 320.

[6]Borrekins v. Bevan, 3 R. 23. Coulter J., says, if an article is sold as a diamond and turns out to be glass, or as tea when it is in fact chaff, the vendor would be responsible; Fraley v. Bispham, 10 Pa. 320.

[7]Selser v. Roberts, 105 Pa. 242.

are not decayed apples. Decayed apples have some use. They may be fed to swine, perhaps; they may be used as manure; but if sold they would be sold, not as "apples" but as "decayed apples." The trade would have made a classification, and would have adopted one name for one class, and another for the other class; and when A undertakes to sell articles as of one class, tender of an article of the other would not be a discharge of the contract.

MERCHANTABLE.

The rule that a sale by sample, is a sale of a thing which is of the kind to which the sample belongs, is qualified by the addition, that the thing of the kind must be merchantable as a thing of that kind, under the kind-name. When A sells goods by sample, the goods furnished by him "need not correspond with the sample except in kind," said the court, adding, properly, "but the goods must be merchantable as that kind."[8] When is a thing merchantable under a given denomination? That it cannot be sold at a certain price, is not unmerchantableness. It might be sold under the same name, e. g. as tea, at a less price. In a certain case, the vendor of tea sued for the price. The vendee paid him for it from fourteen to twenty-two cents per pound, and he offered it at retail at fifty cents and more, per pound. His inability to sell it at that price was not evidence that it was unsalable.[9] Yarn could be sold as yarn, although it was inferior in quality, twist and strength to the yarn that was employed as the sample, and there would be no breach of the warranty implied in the use of the sample.[10] The fact that raisins, which have been sold by a sample of sound raisins, are slightly damaged and are inferior to the sample, and have been sold by the buyer at a loss, is no breach of the warranty.[11] There was no breach when chromatic cards sold by sample, were defective in cut, print and assortment.[12] On the page[13] on which Clark J., informs us that sound and rotten apples are different in kind, he advises us that "to hold that a sale by sample, with-

[8]Selser v. Roberts, 105 Pa. 242; Boyd v. Wilson, 83 Pa. 319; Shaw v. Fleming, 174 Pa. 52; Sims v. Striblen, 16 Phila. 9.

[9]Tete Bros. v. Eshler, 11 Super 224.

[10]Shaw v. Fleming, 174 Pa. 52.

[11]Badeau v. Auerbach, 2 W. N. 223.

[12]Haddock v. Meyer, 38 Leg. Int. 311.

[13]Selser v. Roberts, 105 Pa. 242

out more, imports a sale of sound goods not damaged or spoiled" is erroneous. An apple "spoiled" is probably a "rotten" apple, and how the delivery of rotten apples, in fulfilment of a sale by a sample of sound apples, is a breach of the implied warranty, while a delivery of "spoiled" apples is not, is given to the microscopically wise, only to see.[14] Perhaps what we are to understand is that there are degrees of being "spoiled" or "damaged" and that apples in some of these degrees, would nevertheless be merchantable as apples, while in other greater degrees they would not be merchantable as apples, though possibly as hog-feed, or as manure; and that if the apples, though "spoiled" were only so far spoiled as still to be merchantable as apples, their imperfection was no breach of the implied warranty. In Borrekins v. Bevan[15] the sale was by sample of what is known as "blue paint" or Prussian blue. The article furnished was, apparently, known as a different thing in the market, under the name "verditer blue." Delivery of this article was treated as a breach of the warranty, implied in the use of a sample of Prussian blue paint.

ADULTERATION.

An article of a certain kind and name, may be intermingled with an article of a different kind and name; that is, there may be an adulteration of each by the other; or of the dearer with the cheaper. "Wines are constantly adulterated with brandy," said the court in an early case,[16] "in fact it is in some degree a constituent part of the finest Madeira; and brandy itself passes in the market although notoriously adulterated with alcohol, in a cheaper form. Drugs, chemicals, paints, dye-stuffs, and a countless number of other commodities are constantly purchased by dealers or consumers, with full knowledge that they are not entirely free from admixture. The pigment called white lead, is frequently purchased by house-painters, when they are apprised

[14]In Boyd v. Wilson, 83 Pa. 319, corn in cans was sold by sample. In some of the cans the corn was bad, and, when cooked, was found to be sour, greasy and unfit for food. This was held not to be a violation of the warranty of kind and merchantableness, implied in the sale by sample.

[15]3 R. 23. One witness said the thing delivered "might be called blue paint, but it does not resemble any paint we sell under that name. I think there is inferior blue venditer among it mixed in with dirt. I should not consider this any paint; verditer is not called a high priced paint."

[16]Jennings v. Gratz, 3 R. 168.

that it contains a portion of Spanish whiting, which is not supposed to affect the denomination of the article, but its quality and price." In the case quoted from, A had sold to B, "Young Hyson Tea." Some of the chests contained tea adulterated with leaves of another plant not of the tea family. Whether the adulteration was so extensive as to make it improper to call the article sold Hyson Tea, was a question. The court admitted that adulteration might be carried so far as to "destroy the distinctive character of the thing altogether," and said that in doubtful cases, the only practical test was whether the admixture still remained merchantable under the name tea. That the teas returned by the buyer had been resold by the vendor, at prices not greatly reduced, and to dealers who knew of the first vendee's objection to the tea, was an indication that despite the adulterations, the tea was still merchantable as tea. In Hoffman v. Burr[17] "cotton pickings" being described as what is gathered together in the warehouses or elsewhere, from the cotton, when prepared for the market, and naturally containing other things than cotton *more or less*, it was recognized that there might be more or less of those other things, and therefore more of them than were in the sample by which a lot of pickings was sold. Reference is made in Borrekins v. Bevan, to the English case of Proser v. Hart, 1 Starkie 140, where so-called saffron was sold of which saffron composed but three fourths, and it is said that but for the special circumstance of a very low price being paid for it, it would have been held that it was not the kind of article the buyer intended to buy.

WHAT IS MERCHANTABLENESS?

In a sense, any thing that has been sold, has been "merchantable." The term is defined by the Standard Dictionary "that can be bought or sold; fit to be sold; marketable." B will sometimes buy a thing, because he supposes it to have qualities which it does not have. Probably a thing is "merchantable" in the intended sense, when even when its properties are known, there are constantly persons who will buy it, as being of a certain species. But canned corn which when cooked was "sour, greasy and unfit for food," was nevertheless deemed marketable.[18] Who, with knowledge of these properties would buy such corn? What use would he expect to make of it? Yet

[17]155 Pa. 218.

[18]Boyd v. Wilson, 83 Pa. 319.

in this case the court said "So long as the commodity is salable, its different degrees of quality from good to bad are not the subject of an implied warranty. If it be wholly unmarketable, such as cannot be considered merchantable, probably a different conclusion would be reached, because an unmarketable thing is *substantially different in kind* from one that is salable in the market. In such a case it is not the name merely which governs; but the fact that it is without market value and cannot reasonably be pronounced of the same kind as the sample."[19] Perhaps what is meant by merchantable, is, capable of finding buyers who are aware of the actual properties of the thing, as often as it is offered for sale, as a thing of a certain kind. If persons would buy as canned corn, corn which, when cooked they knew would be unfit for food, though, possibly their only reason for buying it would be, that they intended to sell it, to those who were ignorant of its having this character, such corn would be merchantable; or, if though unfit for food, some persons with knowledge of its attributes would buy it for food it would be merchantable.

DISTINCTION BETWEEN KIND AND QUALITY.

It is not to be wondered at that a distinction so vague as that between kind and quality, between essential character and quality, should have provoked criticism. It is a distinction apparently introduced by Borrekins v. Bevan,[20] the opinion in which is excessively disjointed, inconsequent and obscure. Gibson, C. J., says of it "It seems to have little foundation in reason, and little to recommend it on the score of certainty or convenience in practice." He adds, "It is difficult to comprehend why the vendee shall be taken to have bought on his own judgment as to quality and not as to essence; nor will it be easy to say how far a change may have been produced by adulteration so as to authorize a jury to determine that the one denomination of the article has ended and another begun."[21]

WHAT IS NOT A SALE BY SAMPLE.

When the goods, e. g., boxes of unpared evaporated peaches, are in the presence of the vendee, when the vendor offers to open

[19]A similar thought is expressed in Selser v. Roberts, 105 Pa. 242.

[20]So says Gibson C. J.; Borrekins v. Bevan, 3 R. 23, and Woodward, J., Warren v. Phila. Coal Co., 83 Pa. 437.

[21]Borrekins v. Bevan, 3 R. 23.

them for the inspection of the vendee, who declines because the examination would consume too much time, when instead the vendee examines three or four (out of 100 boxes) and finding them to be sound purchases the 100 boxes, it is error to allow the jury to say that the sale was by sample, that the three or four boxes were "samples." The sale is rather by inspection. "The goods in bulk, were on hand" says Clark, J., "and were exhibited to the buyer. [No; the boxes, but not the contents were so exhibited], their condition and quality were, it is admitted, readily ascertainable by inspection, and a full opportunity to that end was afforded. * * * If it was inconvenient to examine all, the buyer, if still unsatisfied should have protected himself by a warranty."[22] A sells to B seven barrels of plumbago, known to the trade as No. 6. Four months later, B visits A's place of business and examines the plant and facilities and the stock of plumbago. B then purchases ninety barrels of the stock of plumbago on hand. That it was a sale by sample, says Beaver; J., "is disproved, if that were necessary, by the visit and inspection by one of the defendants who * * * * saw and examined the identical stock from which the latter shipment was made."[23]

WHAT IS A SALE BY SAMPLE.

Goods purchased by the vendee from the vendor, on a former occasion, may be made the norm or standard, with which the goods to be again furnished are to correspond; e. g. coal;[24] (the vendor assuring the vendee it was of the same quality the vendee had been buying, and the vendee's order being conditioned upon its being of this quality) but, for some reason, B having already bought of A a car load of window shade rollers, made from good white pine, and from three and a half to four feet in length, and ordering another car load "of the same kind and quality," it was held that there was no warranty that the rollers in this load should not be of a very inferior pine, and too short.[25] A, hav-

[22]Selser v. Roberts, 105 Pa. 242.

[23]Walker v. Taylor, 19 Super. 39. Biddle J., told the jury "If the man said the sample was out of the same bin I do not think that means a warranty or anything at all." The counsel for the buyer seemed to desire to treat the seven barrels as a sample. The court excluded evidence of the want of correspondence between the quality of the seven barrels and that of the subsequently purchased plumbago.

[24]Warren v. Phila. Coal Co., 83 Pa. 437; Loyal Hanna Coal Co. v. Pemberton Co., 8 Lanc. 73.

[25]Coulston v. Nat. Bank, 4 W. N. 297.

ing 850 cases of canned corn, showed B the contents of one can, and furnished B with two other cans, the contents of which he was to cook, and thus test at his home. B finding this corn good, took all the corn. This was a sale by sample.[26] Paint arriving in Baltimore from London, A took some of it as a sample to Philadelphia, and exhibited it to B. B came to no decision to buy at that time, but what he said induced A to send the rest of the paint to Philadelphia. A sale was then made to B, which was conditioned upon the paint "corresponding" with the sample.[27] A exhibits oats to B and agrees that the oats he will furnish shall "be in quality equal to the sample."[28] There may, it is needless to suggest, be a sale at auction by warranty.[29] When a sale is by sample, as well as by name and description, the sample and not the name or description is the standard to which the thing furnished must conform.[30]

NO WARRANTY OF QUALITY.

When a sale was made by sample, that is, when a sample was exhibited, but without express stipulation that it should be the standard not of kind merely, not of merchantableness, as of that kind merely, but also of quality, there was implied at common law in this state, no warranty that the things to be furnished to the vendee in fulfillment of the contract, should correspond in quality with the sample.[31] "The rule is almost universal," said Trunkey J., "that in a sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample. But, in Pennsylvania that rule is eschewed and a sale by sample becomes a guaranty only that the article to be delivered shall follow its kind and be simply merchantable."[32] How absurd this former Pennsylvania rule is, is discovered on very slight reflexion. When a man contracts to buy a thing which is not in his presence, he must define it, more or less, with words. He calls it a horse, or cow, or goat; iron, or copper or zinc. No one ever imagined that when B ordered four horses, the order could

[26]Boyd v. Wilson, 83 Pa. 319.

[27]Borrekins v. Bevan, 3 R. 23.

[28]Sims v. Striblen, 16 Phila. 9.

[29]Barclay v. Tracy, 5 W. & S. 45.

[30]Maute v. Gross, 56 Pa. 250.

[31]Boyd v. Wilson, 83 Pa. 319; Selser v. Roberts, 105 Pa. 242; Mining Co. v. Jones, 108 Pa. 55; Sydney School Furniture Co. v. School District, 44 Leg. Int. 82; 5 Cent. 306; Shaw v. Fleming, 174 Pa. 52.

[32]Mining Co. v. Jones, 108 Pa. 55.

be filled by sending four steers, unless A or B had at the time of making the contract, exhibited, as a sample, a horse.[33] The sample could never have been necessary to define the kind, in so far as kind is distinguishable otherwise than by quality. Qualities are so very numerous, and so incapable of verbal representation, that a specimen, a model, or pattern, only can adequately portray them. When then a sample is used, the understanding of the parties would be, that it was intended to represent not the kind merely, not its merchantability merely, but the congeries of its qualities. So the universal intelligence interpreted the act. Different interpretation of it was made by one or two intellects in Pennsylvania, to whom because of their official place, others felt constrained to show a deference. Relief from the impracticable and absurd rule could not be got from the court which a half century before adopted it, and it was necessary for the legislature to give it. Despite the former rule however there were occasional judicial expressions which seemed to forget it. Thus it was said that a sale of blue paint by sample was a warranty that the substance furnished would "correspond with the sample."[34] Grapes being sold by sample, the trial judge told the jury without animadversion by the supreme court that the grapes furnished must be "equal" to the sample.[35] A sale of superior sweet scented Kentucky leaf tobacco by sample was followed by a delivery to the buyer of tobacco, which was Kentucky leaf tobacco, but was not the sweet scented nor superior. It was faded, rotten and of very bad quality. The warranty was not broken, however.[36]

SAMPLE EXPRESSLY MADE NORM OF QUALITY.

Parties can, with a few exceptions make such contracts as they choose. If A wants to sell coal to B, and to condition B's duty to receive and pay for it, on its possessing certain qualities he is not forbidden to do so; nor is he forbidden to indicate a

[33]A sale under a denomination was itself a warranty or condition that the thing furnished should be of that denomination. A sale, e. g., of "blue paint" required the vendor to furnish blue paint. The sale by description warrants that the article shall be of the kind ordered, and be merchantable, Fogel v. Brubaker, 122 Pa. 7; Tete Bros. v. Eshler, 11 Super. 224. A sale of "tea" obliges the vendor to furnish an article that is salable under the name "tea." Id.

[34]Borrekins v. Bevan, 3 R. 23.

[35]Barclay v. Tracy, 5 W. & S. 45.

[36]Fraley v. Bispham, 10 Pa. 320.

specimen of coal, and to say that the coal to be furnished by him shall possess the same qualities, shall be like (in quality, no less than in kind or merchantableness,) the coal used as a specimen. Hence, although when nothing is said about the sample, it was supposed to be intended only to represent the kind and merchantable state of the thing to be delivered by the vendor, if it was stipulated that the thing to be delivered should be like the sample in other respects, conformity to it in these other respects by the article to be furnished, was necessary. This principle has been applied to coal, bought if like the sample,[37] to lumber sold by a sample to which it was to be similar "in character and quality"[38] to oats, to be "in quality equal to the sample,"[39] to cotton pickings, agreed by B to be taken, if they "equaled the sample" shown him by the vendor,[40] to iron-ore, bought by B, after testing one car load sent him "quality of ore to be up to the sample car load sent us',"[41] to canned corn, the contents of seven cases having been tested by the vendee and found satisfactory, and the vendor agreeing or saying that the remainder should be of the same quality,[42] to tobacco, which, the buyer said, when buying was to "correspond with the sample,"[43] to roofing paper, which was to be equal to a sample, with respect to its power to absorb tar,[44] to madras shirtings, to be furnished to correspond in color and quality with the sample.[45] It is not to be expected that the principle should be found to have been consistently applied. B having tried a carload of window shade rollers fur-

[37]Warren v. Philadelphia Coal Co., 83 Pa. 437.

[38]Johnston v. Sanger, 4. Walk. 458.

[39]Sims v. Striblen, 16 Phila. 9. In Jones v. Jennings, 168 Pa. 493, Jennings ordered by letter "60 tons steel scrap similar to sample wagon load delivered to us this A. M." This was a sale by sample.

[40]Hoffman v. Burr, 155 Pa. 218.

[41]Mining Co. v. Jones, 108 Pa. 55.

[42]Boyd v. Wilson, 83 Pa. 319. dictum.

[43]Edwards v. Neill, 1 W. N. 40. The affidavit of defence alleging this fact and the inferiority of the tobacco furnished was sufficient to prevent judgment. But in Altoona Iron Works v. Axle Co., 6 W. N. 271 an affidavit was held insufficient which alleged that the iron for whose price suit was brought had been sold with the understanding that it should be "according to samples supplied" by the vendee.

[44]Hays v. Kingston, 23 W. N. 277. The sample paper absorbed one and one-half times its own weight in tar. The paper furnished could absorb only twenty-one twentieths of its weight.

[45]Simpson v. Karr, 22 Super. 8.

nished by A and found them satisfactory, ordered another carload "of the same kind and quality." An affidavit of defense, in the suit by A for the price, was adjudged insufficient, although it alleged that the rollers in the second car load were of lumber very inferior to that of the rollers in the first car load, and that many of them were shorter, and too short.[46] The color of bricks may be warranted to correspond with that of the sample.[47]

HOW EXPRESS IS THE REFERENCE.

Apparently, the reference to the quality of the sample did not always need to be very explicit. B requesting a sample of lumber for molding for picture frames, it was sent, and thereupon B ordered molding, making no reference to the sample. He described the wood as "your gum wood." An affidavit of defense was held sufficient which alleged that the wood furnished was not the kind used for molding, was not seasoned, was of poor grain, bad color, and inferior quality, and in no respect like the sample; was, some of it, what is known as "culls;" some of second grade lumber.[48] If the seller says the articles furnished shall be of the same quality as the sample[49] or if the buyer orders the article to be of the quality of the sample[50] or, if it is of the same quality[51] or, having seen the sample, says he will buy the articles at the price named, and shortly afterwards the vendor sends the articles, there is a warranty.[52] The use of the word "warrant" is unnecessary.[53] The agent of vendor warranted that the goods should be like and as good as the sample.[54]

EVIDENCE OF MARKET VALUE.

In ascertaining whether iron ore furnished corresponded with the sample, one witness may describe the sample; another witness may testify to an analysis of the ore furnished; showing its unfitness for "fix," its want of uniformity; its being badly culled; its being mixed with much rock and inferior ore, but the

[46]Coulston v. Nat. Bank, 4 W. N. 297.

[47]Baltimore Brick Co. v. Coyle, 18 Super. 186.

[48]Tennesse Lumber Co. v. Garrison, 10 Sadler, 67.

[49]Boyd v. Wilson, 83 Pa. 319.

[50]Boyd v. Wilson, 83 Pa. 319; Mining Co. v. Jones, 108 Pa. 55.

[51]Warren v. Phila. Coal Co., 83 Pa. 437.

[52]Hoffman v. Burr, 155 Pa. 218.

[53]Warren v. Phila. Coal Co., 83 Pa. 437.

[54] Tyrrell v. Rockwell, 2 C. P. 223. The goods furnished were shelf-worn and unsalable. This was a breach of warranty.

character of a quantity of ore taken from the vendor's place of business, a year after the contract in question is irrelevant.[55] So doubtless, since market value can be known only by a knowledge of the properties of the ore, and by a knowledge of the value in the market of ores having these properties, one man could testify to the properties of ore in question, and another to the market value of such an ore. An expert may testify for the vendee, sued for the price, as to his opinion concerning the necessity of uniformity in the character or classification of ores used in the manufacture of iron, in order to have good results. This opinion will assist in determining the market value of the ore.

OTHER LOSSES.

Whether the vendee can, besides avoiding paying the contract price of the thing, or anything more than the market value of it, recover for losses arising from his use of it, before he became aware of its bad properties, or for damages which he may have incurred by selling it, with warranty, or representations to another, the cases on sale by sample do not distinctly decide. If B, the vendee of worsted yarn, in turn sells it to C, and A, the primary vendor makes some arrangement with C, by which C is induced to continue to use the yarn, on A's promise to indemnify him for any loss thereout arising, B will not be entitled as set-off, when sued on the contract by A, to the sum which A is bound to pay to C.[56] In Warren v. Pennsylvania Coal Co.[57] an action for the price of coal, it was shown that the defendant in buying inquired particularly of the quality of the coal. The vendor's agent assured him that it was of the same quality as he had been buying. He then said to the agent "if so, to put it on the wharf at four dollars per ton, but, if it was not good coal, I [he] would not have it." From this evidence Woodward, J., says the jury might have found an agreement on the part of the vendor to be answerable for the quality of the coal. The defendants *then* offered to show that the coal delivered hindered and delayed them in their business, and that they suffered loss thereby; that the coal was bought to be used in raising steam at a paper mill, as the vendors knew, and that it was unfit for that

[55]Mining Co. v. Jones, 108 Pa. 55.

[56]Shaw v. Fleming, 143 Pa. 104.

[57]83 Pa. 437.

purpose. The rejection of this offer was justified on the ground that it was made "upon the assumption of a legal implication of a warranty, arising from a [the?] single fact of the sale itself." The justice seems to intimate that, if there was no warranty of quality, the evidence was inadmissible, and if there was a warranty, the evidence should have been admitted. When the offer was made, the evidence was already in, from which, the justice concedes, the jury might have inferred a warranty. Then, why was the evidence not receivable? The unintelligible language of the justice fails to enlighten us. Would a vendor, selling with warranty, coal, which he knows is bought to be used in a certain way, be liable for losses arising from the attempt by the vendee, to use it in this way, before discovering its unfitness? The case called for an answer to this question, but the decision gives none.

FRAUD IN INDUCING ASSENT TO SAMPLE.

The vendor may induce the vendee, or the vendee the vendor, to adopt the sample by means of a trick or fraud. When the fraud is upon the vendee, he will not be obliged to accept and pay for a material, e. g. lubricating oil, that is inferior to the kind the vendor knew that he intended to buy. B agreed to accept in payment of a debt, due by A, oil, at a certain price per barrel. The oil was to be like that furnished by A to the House of Refuge, and the certain iron works in the city of Philadelphia. In order to designate the oil, in the written contract, A undertook to procure a bottle of the oil intended. He procured a bottle of a very inferior sort, worth only sixteen cents per gallon, instead, as he represented, $1.80. B was not bound to accept oil like that in the bottle.[58] If A, offering 850 cases of canned corn, selected three cans from them, the contents of which were known by him to be in good condition, and submitted them to B, as samples, and B, finding them good, bought the rest, B would not be bound to accept and pay for them if they were in fact seriously inferior to the sample. So, if there were two lots of corn, one inferior to the other, and A selected as a sample of the inferior lot a specimen from the superior lot, this would be fraud.[59]

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[58]Maute v. Gross, 56 Pa. 250.

[59]Boyd v. Wilson, 83 Pa. 319, dicta. Cf. Sims v. Striblen, 16 Phila. 9.

MODEL FOR MANUFACTURE.

If B orders from a manufacturer, A, the manufacture of certain articles, e. g. gas generators[60] or books,[61] furnishing a model or sample, and ordering the articles "as per sample shown," the articles must correspond with the sample in essential particulars. The fact that the gas generator furnished will not produce the effect which the model produces, may be shown as evidence that it does not correspond with the model. If like the model in essential respects, it will produce the same effects. Direct evidence of want of correspondence with the model, e. g. difference of shape of perforated case; difference in respect to the movableness of the chimney, in the length of the burner tube, and of the wick-tube is receivable.[62] In Gallagher v. Philadelphia, the Bureau of Gas of the city ordered 110 meter inspector street books, with 200 leaves each; paper Whiting Standard Ledger, 22 lbs. They were to be crown bound, in full American Russia leather, sewed with extra heavy thread, on two extra heavy bands, "paper and binding to be fully equal to sample shown in every particular." In the suit for the contract price, it was held that the use of paper with the water mark "Whiting Linen Ledger" was not a breach of the contract, if the makers of the Whiting Standard Ledger had changed the name of the same paper to Whiting Standard Linen. It was also held that the withdrawal by the city, of its model books, before the completion of the manufacture, excused the manufacturer for deviations from it in unimportant details, e.g. in using three binding stitches instead of four, a book with three stitches being proved to be "equal to the sample shown," in strength.[63] The model may be modified by agreement of the parties, and then the maker must conform to the modified model.[64]

CUSTOM.

That the liability imposed by the law, in the absence of a contract of parties, may be varied by the terms of the contract,

[60]Tilton v. Miller, 66 Pa. 388.

[61]Gallagher v. Philadelphia, 9 Super 498.

[62]Tilton v. Miller, 66 Pa. 388.

[63]The specifications required simply that the books be "sewed with extra heavy thread, on two extra heavy bands." They did not specify the number of stitches unless the words "fully equal to the sample shown in every particular" was such a specification.

[64]Tilton v. Miller, 66 Pa. 388.

is a principle too well established to need vindication. Even when a mere contract of sale imposed no liability upon the vendor for the quality, he could agree to warrant and thus create that liability. So, selling by sample, he could agree that the thing sold should have the qualities of the sample, and thus make himself liable should it not have them. Could the assumption of such a liability be effected through a custom? In 1831, it was held that a vendee of cotton could recover damages for its latent defects, although there was no warranty or fraud on the part of the vendor, if there was a custom of trade in Philadelphia, where the sale was made, that the vendor should answer to the vendee for such defects.[65] Gibson C. J., dissented because the local customs were "in derogation of the general law." But there is no law, either general or special, that the vendor shall not be liable, if he is willing to contract to be, nor is there a law, general or special, that a custom, in view of which parties contract, may not be proved in order to prove what they have contracted to do; in particular, in order to prove that in addition to what they have said or written, they have contracted thus and thus. In Wetherill v. Neilson,[66] there was an effort to prove a custom in Philadelphia, with respect to soda ash, to the effect that the vendor, if he represents the percentage of soda therein, is bound to make the representation good, although he neither warrants nor commits a fraud. Lowrie, J., approved of the exclusion of the evidence. Conceding the admission of a similar custom in Snowden v. Warder, he professes to be unable to follow the example. Adopting C. J. Gibson's thoughts he says, "If we admit evidence of this special custom we allow the law to be changed (!) by the testimony of witnesses, or by the soda dealers of Philadelphia." As well say that when a contract is made, it changes the law, because it changes the legal obligations of the parties.

His other objection is, that "The custom, if respected at all, must be regarded as part of the contract, whether written or verbal, and then their uncertainty [i. e. that of contracts] is apparent." But objection on this ground has not prevailed. In Boyd v. Wilson[67] a suit for the price of 850 cases of canned corn,

[65]Snowden v. Warder, 3 R. 101.

[66]20 Pa. 448.

[67]83 Pa. 319. The supreme court said nothing on the subject. In Hoffman v. Burr, 155 Pa. 218, an action for the price of cotton pickings, it appeared that the vendee instead of examining them at the wharf moved them from the wharf to his warehouse. He there found them defective. Proof was received by Hare, P. J., of a custom that if the purchaser did not examine goods at the wharf, if he subsequently found them defective, he could not, though there was a warranty, recover the cost of transportation.

evidence was received of a custom among dealers in canned fruits in Philadelphia, not to exact payment for defective fruit, to allow its return, and to refund the price paid, or to furnish a sound commodity. Briggs, J., stated to the jury the properties which such a custom had to possess, in order that it might affect the rights and liability of a vendor.

WAIVER OF STRICT CONFORMITY WITH SAMPLE.

The vendee may preclude himself from taking advantage, by refusing to accept the articles and to pay for them, or by demanding an abatement of the price, of the departure of the articles from the standard. B ordered 23,000 bricks, to be in color and otherwise, like a sample brick. They were sent in three parcels, at intervals. The first and second parcels were received without complaint, and retained for a considerable time. The vendee urged the sending of the remainder. The remainder came. If the vendee could not be obliged to accept and pay for the remainder, he was liable in damages for not accepting them. He was also liable for the contract price of the bricks in the first two parcels[68]

THE ACT OF APRIL 13TH 1887.

The act of 1887 provides that "In all sales by sample, unless the parties shall agree otherwise, there shall be an implied warranty on the part of the seller, that the goods, chattels and property sold and to be delivered are the same in quality as the sample shown." It is intimated that the departure from the quality of the sample, must be "material" in order to violate the warranty.[69] The 494th section of the German Civil Code, which went into effect on January 1st, 1900, enacts that "In a sale ac-

[68]Baltimore Brick Co. v. Coyle, 18 Super 186. The vendor had paid the expense of the transmission of the bricks. When the third parcel arrived, the vendee notified the vendor that he would not retain any of the bricks.

[69]Baltimore Brick Co. v. Coyle, 18 Super 186 (color of bricks). In Sydney School Furniture Co. v. School District, 44 Leg. Int. 82; 5 Cent. 306, Green, J., says the rule that a sale by sample did not imply a warranty of quality has "been enforced many times in circumstances of great hardship to the purchaser and not without a feeling of reluctance on the part of the courts in view of its apparent lack of justice in particular cases." But the courts invented the rule and refused to abolish it. In Loyal Hanna Coal Co., v. Penna. Iron Co., 8 Lanc. 74, a sale of coal by sample since the act of 1887, was held to imply a warranty of correspondence in quality with the sample. Cf. also, Nelms v. Heintsh, 13 Lanc. 62, where was a sale by sample of Clinton goods for painters' use.

cording to sample, or according to pattern, the qualities of the sample or pattern are deemed to have been warranted."

CASES IN WHICH SAMPLES HAVE BEEN USED.

Samples have been used in sales of a great variety of things, some of which are here enumerated: unpared evaporated peaches[70] barrels of plumbago,[71] grapes,[72] lubricating oil,[73] iron ore,[74] cans of corn,[75] coal,[76] blue paint,[77] boxes of raisins,[78] fancy chromatic cards,[79] Kentucky leaf tobacco,[80] roofing paper,[81] gum lumber for moldings,[82] Worsted yarn,[83] oats,[84] cotton pickings,[85] bricks,[86] madras shirtings.[87]

VENDEE'S REMEDIES FOR BREACH OF WARRANTY.

Vendee does not accept the goods.

When goods are ordered to correspond with a sample, the vendee may, if they do not correspond, reject them, and thus escape all liability for the price or value.[88] This complete escape of the vendee from pecuniary liability, was realized by the purchaser of cotton pickings, which when sent, were found by him to be inferior to the sample with which they were to correspond.[89] In such a case,

[70]Selser v. Roberts, 105 Pa. 242.
[71]Walker v. Taylor, 19 Super 39.
[72]Barclay v. Tracy, 5 W. & S. 45.
[73]Maute v. Gross, 56 Pa. 250.
[74]Mining Co. v. Jones, 108 Pa. 55.
[75]Boyd v. Wilson, 83 Pa. 319.
[76]Warren v. Phila. Coal Co., 83 Pa. 437.
[77]Borrekins v. Bevan, 3 R. 23.
[78]Badeau v. Auerbach, 2 W. N. 223.
[79]Haddock v. Mayer, 38 Leg. Int. 311.
[80]Fraley v. Bispham, 10 Pa. 320; Strauss v. Welsh, 22 Super 437.
[81]Hays v. Kingston, 23 W. N. 277.
[82]Tennessee Lumber Co. v. Garrison, 10 Sadler 67.
[83]Shaw v. Fleming, 174 Pa. 52; (Also 143 Pa. 104; 9 Sadler, 457.)
[84]Sims v. Striblen, 16 Phila. 9.
[85]Hoffman v. Burr, 155 Pa., 218.
[86]Baltimore Brick Co. v. Coyle, 18 Super 186.
[87]Simpson v. Karr, 22 Super 8.
[88]Tete Bro. v. Eshler, 11 Super, 224; Dailey v. Green, 15 Pa, 118, 126.
[89]Hoffman v. Burr, 155 Pa. 218. Sixty tons of steel scrap being sent by railroad, which was agent of the vendor, there must be an acceptance by the vendee, in order to entitle the vendor to the price. Without such acceptance, he can recover damages only for breach of the contract. Jones v. Jennings, 168 Pa. 493.

the vendee is not bound to show the market value of the goods, for he is not bound to pay it. If he seasonably notifies the vendor that he declines to retain the goods and that he holds them at the disposal of the vendor, this person must suffer the loss should they be destroyed by fire before their removal from the vendee's property.[90] Some only of the things furnished may be inferior. If the vendee accepts, e. g. 18,000 bricks of 23,000, and retains them, he is not for that reason compelled to accept the remaining 5,000, if they are below the sample.[91] Sale of wrapper tobacco. Some of it was found to be bad, but the vendee was deterred from returning it, by the promise of the vendor that, if he would keep and use as much as he could, he should not be charged for so much as he could not use. He could not be compelled to pay for so much as he could not use.[92] Sale of madras shirtings, which in color and quality were to correspond with a sample. One installment did not correspond but the vendee retained it on the promise of the vendor, of a reduction of price for any loss, and that the future instalments should correspond with the sample. Future instalments being inferior, the vendee could refuse to receive them, and escape the payment of any thing.[93] Sale of 5,000 tons of iron ore to be delivered, 500 tons per month. If after some of it has been received and retained, later instalments prove to be inferior to the sample, the vendee may reject them and decline to pay anything.[94] A having agreed to accept from B, his judgment debtor, lubricating oil of a certain quality, in payment of the judgment, is not bound to accept oil inferior to the standard agreed upon, and if such inferior oil is tendered, may rejecting it, compel payment in money.[95]

When vendee accepts the goods.

When the vendee accepts the goods, he does not *ipso facto* bind himself to pay the contract price for them. His acceptance is not conclusive that the goods are as they were warranted to be, nor does it estop him from showing that they are inferior to the sample. And if the goods are shown to be inferior to the

[90]Id.

[91]Baltimore Brick Co. v. Coyle 18 Super. 186.

[92]Straus v. Welsh, 29 Super. 437.

[93]Simpson v. Karr, 22 Super. 8.

[94]Mining Co. v. Jones, 108 Pa. 55.

[95]Maute v. Gross, 56 Pa. 250.

sample, in an action for the purchase money, the vendee will have a right to a reduction from the price, but not to exemption from the duty of any payment whatever.[96] The vendor may recover the actual market value of the thing furnished, less any admissible losses that may be the proximate result of the supply of an inferior thing. In a suit[97] for the balance of purchase money of roofing paper, the affidavit set up that the inferior quality of the paper, caused a loss equal to thirty per cent of the price, or more than the residue of the purchase money sued for. It was error to enter judgment for the plaintiff, for the full amount claimed, but how much, if any, could have been recovered, was not considered by the supreme court. In Mining Company v. Jones[98] it is apparently assumed, the action being for the contract price of iron ore, that the defendant could deduct from the contract price as damages the difference between the contract price and the market value; that is, that the plaintiff could recover the market value. The court awkwardly lays down the rule that the defendant may "set-off or recoup," as against the contract price, the difference between that price and the market value of the ore," simply a round about way of saying that, as the defendant did not get what he contracted for he is not bound to pay the contract price, but as he did get something he is bound to pay the market value of what he got. In Selser v. Roberts[99] a suit for the price of unpared evaporated peaches, the vendee alleged that they were some of them unmerchantable and claimed $212 as a set-off, having sold them at a loss of that amount. This the trial court allowed; but the supreme court reversed because it found no warranty of quality. Possibly the theory was that the resale, on which a loss of $212 was suffered, was satisfactory evidence of the actual market value of the peaches.

[96]Tete Bros. v. Eshler, 11 Super. 224; Baltimore Brick Co. v. Coyle, 18 Super. 186.

[97]Hays v. Kingston, 23 W. N. 277.

[98]108 Pa. 55. It is said to be incompetent to prove the difference in value between the sample and the ore, because the affidavit of defence had indicated another measure, and it was by the rule of the court, conclusive.

[99]105 Pa. 242. In Johnston v. Sanger, 4 Walker, 458, it was held that if the vendee of lumber accepted it, and retained it, he could not avoid paying the contract price, unless he had been induced to accept by some fraud; but this must be error. In Loyal Hanna Coal Co. v. Penn. Iron Co., 8 Lanc, 73, the vendee having kept the coal, which was unequal to the sample, was entitled to a "set-off," i. e. to the difference of value and price.

MARKET VALUE WHEN?

As the defendant has not ordered the goods, inferior to the sample, and may reject them and thus avoid all liability for them, he becomes liable for any thing only by accepting what is furnished him, or by such conduct as may be equivalent to an acceptance. Hence, the market value of the goods, e. g. iron ore, at the time of the acceptance of it will be what the defendant must pay. But if the vendee has been delayed in making a final decision whether to accept or reject after the receipt of the goods, by the representations and inducements of the vendor the date of the final decision, not of the receipt of the goods will be the date the market value at which will be the sum which the vendee must pay.[1] The contract is then made.

INTEREST ON THE MARKET VALUE.

Even when the things furnished, e. g. iron ore, have not corresponded with the sample, and the duty of paying for them depends on the acceptance of them, and, even when accepted, the sum to be paid is, not the contract price, but the market value, the jury must allow interest on this market value from the time of the acceptance, which constituted the contract. It is error to permit the jury to allow interest or not in its discretion. "A *bona fide* dispute as to the amount of indebtedness is no bar to the accruing of interest."[2]

DELAY IN RETURN OF GOODS.

When goods are sent to a vendee, as if in pursuance of a contract of purchase, it is his duty to examine them in a reasonable time, and, finding them below the standard fixed in the contract, to return them. He cannot retain them for an indefinite time, and then return them. The thing sold being tea, a retention of it for four months, before offering to return, is unreasonable. The vendee must be treated as having accepted and his only right when sued for the price will be to escape paying the contract price, and to pay only what the tea was worth.[3] A delay of sixty or ninety days in returning so-called Clinton goods, for painters'

[1]Mining Co. v. Jones, 108 Pa. 55. The principle stated by the trial judge (p. 61), is not rejected by Trunkey, J., but only its applicability under the evidence (p. 68).

[2]Mining Co. v. Jones, 108 Pa. 55.

[3]Tete Bros. v. Eshler, 11 Super. 224: Hoffman v. Burr, 155 Pa. 218.

use, was held unreasonable. A week or ten days would have been allowed. Delay may be made reasonable by circumstances e. g. the failure of the vendor to send a bill to the vendee.[4]

EVIDENCE OF NON-CONFORMITY WITH SAMPLE.

A sale of "steel scrap similar to sample wagon load" already delivered to the vendee having been made, it is said that an analysis of the steel scrap sent in fulfillment of the contract, demonstrated that it did not correspond in quality with the sample. There was however, evidence that it was taken from the same pile and was similar in external appearance. The vendor denied, and the vendee affirmed that the similarity or dissimilarity was to be determined by the analysis. It was submitted to the jury to determine and the jury determined that the analysis was not the decisive test, and that the scrap furnished was "similar" to the sample; i.e. apparently, that "similar" did not mean similar in chemical constitution, but in external appearance, and in respect to the identity of the pile from which both sample and scrap furnished were taken. McCollum, J., says, we must assume, therefore, for the purposes of our present inquiry, that the material which the defendants (vendee) refused to accept was such as the contract called for.' [5]

VENDOR'S REMEDY.

When the sale is of goods not specified at the time of making the contract, if, when they are sent to the vendee, he rejects them, because they are, as in fact they are, inferior to the sample which they are warranted to equal, the vendor can recover nothing. If the goods do correspond with the sample, and they are nevertheless rejected, the vendor cannot recover the contract price, but only damages for the vendee's breach.[6]

SUIT ON THE WARRANTY.

The breach of the warranty can be shown not only when the vendee is sued for the price of the thing sold, but also when a direct action is brought upon the warranty itself. The vendee may have paid the purchase money in full, or he may have paid

[4]Nelmes v. Heintsh, 13 Lanc. 62.

[5]Jones v. Jennings, 168 Pa. 493. Whether there was parol evidence bearing on the meaning of the word "similar" and why the jury, not the court, interpreted a writing, does not appear.

[6]Jones v. Jennings, 168 Pa. 493. In Nelms v. Heintsh, 13 Lanc. 62, it seems to be assumed that the contract price can be recovered.

more of it than he was equitably bound to pay. He may then sue on the warranty in assumpsit.[7] If the vendor is a foreign corporation, its property in this state is subject to a foreign attachment by the vendee. The action, says Allison, P.J., "is not to recover damages for deceit or misrepresentation, but for non-compliance by the defendants with their contract made with the plaintiffs. The remedy in a case of this character, is not by action *ex delicto*, nor is it for a tort for which foreign attachment will not lie."[8] The action on the warranty is not for a rescission of the contract, and therefore can be sustained without a return of the goods, or a tender of them, to the vendor.[9]

AFFIDAVIT OF DEFENCE.

In a large number of cases, the absence of a warranty from the sale by sample has been adjudicated, in considering the sufficiency of an affidavit of defence. If the affidavit alleged a contract that the articles furnished should correspond with the sample, and that they did not so correspond, it was sufficient;[10] if it alleged simply a sample, and that the goods were in quality inferior to it, it was insufficient.[11] Under a rule of court which confines the defence, at the trial to matters averred as a defence in the affidavit, if the affidavit fixes a measure of damages, the defendant is limited to that measure.[12]

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[7]Borrekins v. Bevan, 3 R. 23; Sims v. Striblen, 16 Phila. 9.

[8]Sims v. Striblen, 16 Phila 9.

[9]Borrekins v. Bevan, 3 R. 23.

[10]Simpson v. Karr, 22 Super. 8; Strauss v. Welsh, 29 Super. 437; Tyrrell v. Rockwell, 2 C. P. 223

[11]Badeau v. Auerbach, 2 W. N. 223; Altoona Iron Works v. Axle Co., 6 W. N. 271; Haddock v. Mayer, 38 Leg. Int. 311; Edwards v. Neill, 1 W. N. 40; Hays v. Kingston, 23 W. N. 277: Tennessee Lumber Co. v. Garrison, 10 Sadler 67; Shaw v. Fleming, 9 Sadler, 457.

[12]Mining Co. v. Jones, 108 Pa. 55.

MOOT COURT.

WILLIAM BARSH v. JOHN TENDRAL.

Execution of Wills.

STATEMENT OF FACTS.

John Hollopan, about to die, called two friends to his bedside, and bade one of them write what he dictated. One of them seized a lead pencil and a scrap of paper and wrote, "All my property when I die I give to my nephew, John Tendral." This was read to Hollopan, who nodded assent to it. He was asked to sign it, made an effort to seize the pencil, when he fell back into his pillow and expired. This will was admitted to probate on July 3d, 1891. Doubting its validity Barsh, another nephew, claiming an undivided half of the land by descent, brings this ejectment on August 11th, 1907.

Kinard for the Plaintiff.

Fetterhoof for the Defendant.

OPINION OF THE COURT.

KOPYSCIANSKI, J.:—"Every will shall be in writing and unless the person making the same shall be prevented by his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his expressed direction, and in all cases shall be proved by the oaths and affirmations of two or more competent witnesses, otherwise such will shall be of no effect. Act April 8, 1833."

It appears that John Hollopan was of a sound and disposing mind and memory, called two friends to his bedside, and bade one of them to write what he dictated. One of them seized a lead pencil and a scrap of paper and wrote "All my property when I die I give to my nephew, John Tendral." This was read to him, who nodded an assent to it. He made an effort to seize the pencil and sign it, when he fell back into his pillow and expired. This was admitted to probate July 3, 1891.

The question is whether this will falls within the saving or exceptions in the Act of April 8, 1833.

In Covett's Appeal, 8 W. and S. 25, Chief Justice Gibson intimated that a liberal interpretation should be given to the Act of 1833.

The Act of 1833 directs and requires that the will shall be signed at the end thereof with the name of the testator subscribed by himself or by another by his express direction and in his presence unless prevented by the severity of his last sickness.

I take it that when and so long as a man has physical power and ability to affix his own signature, however serious his illness, he is not bound to call in the aid of another, but that his name subscribed by his own hand is in such case the signature the law contemplates, but it is possible that while making an effort to sign it, such physical power may be suddenly and unexpectedly taken from him, and he may be surprised by the extremity of his death, with no intervals in which the expressed direction to another to sign for him could be given. It does not appear that Hollopan could give the direction after falling back into his pillow, nor is it it alleged by the plaintiff that he could. I think the case clearly comes within the exceptions and saving of the Act of April 8, 1883. Showers v. Showers, 27 Pa. 385.

The cases cited by the learned counsel for the plaintiff, especially Stricker v. Grove, 5 Wharton 397, upon which he laid so much stress, I have considered, but cannot see how they could apply to the case at bar. Here the putative testator being personally unable to sign had time and opportunity to ask another, but failed to do it. The will failed, and Chief Justice Rogers therein says: "If the paper be not signed it is unnecessary to argue. Why it is not signed unless the omission to execute the instrument arises from mental imbecility or bodily infirmity of the testator, a total incapacity on his part either to sign the paper or to give the required direction to others."

Dunlap v. Dunlap, 10 Watts 153. The point decided was a mere inferential direction to sign. The hand of the putative testator had been guided in tracing his signature while he was lying in a state of insensibility That would not meet the requirement in the statute of an express direction to sign because ratification is only an equivalent for authority by implication.

The testator in the case at bar while making an effort to sign was surprised by the supervention of an inability to sign. There was no moment in which the testator could make a request of another, by reason of suddenness and completeness of the prostration of physical and mental powers. I think the case clearly falls within the exception or saving clause of the act.

The will being valid, the action of ejectment fails.

Judgment for defendant.

OPINION OF SUPERIOR COURT.

The will was written by another than the testator. It is not for that reason invalid. Being written, it was read to the testator. His own perusal of it is not necessary. He may be illiterate, and, therefore, unable to read, or he may be blind, or extreme feebleness may make reading irksome. Assent to the will is normally expressed by the subscription by the testator or of some one at his direction and in his presence of his mark or name. But the statute does not require this where the testator is "prevented by the extremity of his last sickness." Here, Hollopan nodded assent to the will, as read to him, but did not write his name, nor call on others to write it. He made no effort to take the pencil, but immediately fell back into his pillow and expired. This surely was prevention of signing by the extremity of last sickness.

Capacity to sign or to direct others to sign, is presumed. When the will is offered for probate, and it is found by the register to be unsigned, he must reject it, unless evidence of the excusatory facts is given to him. His probate of it, without such evidence in his record, would be void. Funston's Estate, 24 Pa. C. C. 135. But the record of the probate shows that the incapacity of the testator to sign, was proved before the register. He had jurisdiction. His decision on the credibility of the witnesses, and on the truth of their testimony is conclusive. It could not now, after the lapse of three years, Act June 20th, 1895, be assailed by appeal to the Orphans' Court. It could not be assailed at any time in ejectment. Wilson v. Gaston, 92 Pa. 207. Cf. Smith v. Beales, 33 Super. 570.

Judgment affirmed.

WM. BARTON vs. JOHN ADAMSON.

Riparian Owners. Damming Water.

STATEMENT OF FACTS.

Adamson and Barton are riparian owners on opposite sides of the stream. The spring thaws, for some years back, have regularly flooded the lands of both. Adamson erects a wall on his land along side of the stream to prevent flooding, and as a result, the flood encroaches on Barton's land to a greater extent than formerly, to B's damage. This is trespass by Barton for damages.

Branch for the plaintiff.

Jenkins for the defendant.

OPINION OF THE COURT.

GOLDSTEIN, J.—The question to be decided is whether or not the waters of a stream which has been caused to overflow by rains and melting snow are to be considered surface water or a part of the original watercourse.

In Pennsylvania. it has not been decided, and in other jurisdictions the authorities are in conflict, but from the facts in the case and surrounding circumstances we will endeavor to decide the question not only upon legal, but on equitable grounds.

In Fry vs. Warne 29 Wis., it was said: "A water course consists of bed, banks and water; yet water need not flow continually; and there are many watercourses which are sometimes dry. To maintain the right to a watercourse or brook it must be made to appear that the water usually flows in a certain direction, and by a regular channel with banks and sides. It need not be shown to flow continually, and it may at times be dry, but it must have a well defined and substantial existence."

In the case before us we are of the opinion that when the water overflowed it had no bed or banks, and it affirmatively appears that there is also wanting the usual flow of water which is an essential element of

a water course. The flow of water is the exception and not the rule. It occurs only in times of freshets, or after considerable rains and is exclusively surface water.

In Miller vs. Sauback, 47 Pa., 154, Thompson, J., said: No doubt the owner of land through which a stream flows may increase the volume of water by draining into it without any liability to damages by a lower owner. He must abide the contingency of increasing or diminishing the flow in the channel, because the upper riparian owner has the right to all the advantages of drainage or irrigation as reasonable use of the stream may give. If he can drain the water from his land into the stream we see no good reason why he may not erect a wall so that the water cannot overflow his land, and thus avoid the necessity of having to drain it off afterwards.

If the plaintiff has suffered any damage it is "dammum abseque injuria." There is no such thing known to the law as a right to any particular flow of surface water, "jure naturae." The owner of the land may at his pleasure withhold the water flowing on his property from passing in its natural course on to that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming on to his own. Neither the right to discharge, nor to receive the surface water can have any legal existence except from a grant, expressed or implied.

Bowlsby vs. Speer 31 N. J. L., 852 J. Hough in Munkres vs. Kansas City, etc., R. R. Co 72 Mo. said: "A water course is a stream or brook having a definite channel for the conveyance of water. It may be made up, more or less, from surface water from rains and melting snow, but after it enters into a channel and commences to flow in its natural banks, it is no longer to be considered surface water."

Morton, C. J., in Rathke vs. Gardner 134 Mass. 14. As between the owners of contiguous estates, it is settled in this Commonwealth that the right of an owner of land to occupy and improve it as he may see fit, either by erecting structures or by changing the surface, is not restricted by the fact that such use of his own land will cause surface water to flow over adjoining lands in greater quantities, or in other directions than they were accustomed to flow. If, by this use, the adjoining land is damaged, it is "dammum obsque injuria."

Such water is practicaily surface water. It occupies, temporarily, land used for other purposes. The right to divert or impede its flow is quite different from the right to divert or impede the flow of water in its channel. Overflowed water is an outlaw, tending to interfere with the legitimate use of land which it overflows. In natural progress of improvements it may be expected that it will become more and more restricted.

In some jurisdictions water which overflows the banks of watercourses by reason of the insufficiency of the channel to carry off all the water are declared to be surface waters.

(1). Morris vs. Council Bluff, 67 Iowa 346.

(2). Jones vs. St. Louis, etc., R. Co.; 84 Mo., 151.

After flood waters have lost all connection with the watercourses and cannot return thereto as the water subsides they should be unquestionably considered as surface waters.—Muckels vs. Kansas City, etc. R. Co., 72 Mo., 514.

It is important to note the distinction recognized by all courts between water within the banks of a natural stream, and water which in times of freshets overflows the boundary of the natural and ordinary chanel of the stream and rests or flows outside such boundary and upon the land adjacent thereto. Such overflowing water upon lands outside of the natural banks of the stream is recognized and classified as surface water. *This recognition and classification is uniform.* (See Shane vs. Kansas City R. Co., 71 Mo. 238.

All waters from rain, melted snow, etc., wherever found outside the natural banks of a stream are surface waters, to be absolutely appropriated, if he sees fit, by the one on whose land it is found, or if he prefers to be fenced out or embanked against to keep it off his land; as it is regarded as the common enemy against which all are authorized to protect themselves, as the necessity of the case may require. Overflow water is subject to the rules governing surface water to the extent that it cannot be concentrated in a single channel and cast on to the land of a lower proprietor. McCormick v. Kansas City, etc. R. Co., 70 Mo. 359.

Flood water which has spread over the surrounding country is surface water. Schlider vs. Northern Pac. R. Co., 29 Mo. app. 68.

We are of the opinion that when the stream overflowed its banks by reason of the spring thaws and freshets, the water so overflowing upon the lands of the plaintiff and defendant respectively constituted no part of the natural channel or water course. The rains occurring during the spring, and for such a brief period of time are not of such a character as to be defined as a water course. They are of a casual or vagrant character following no definite course and having no substantial or permanent existence, and which are lost by being diffused over the surface of the ground, through percolation into the soil, and by evaporation. They do not return to the natural channel, but on the contrary, where a stream has become swolen by reason of rains and melting snow, the surplus water flows over adjoining lands and disappears by sinking into the earth and by evaporation caused by the heat of the sun. They do not have the "animus revertendi." The surplus water is not a portion of the watercourse, and to constitute a water course the flow of water must possess that unity of character by which the flow on one persons land could be identified with that on his neighbor's land. To maintain the right to a watercourse it must be made to appear that the water usually flows in a certain direction and by a regular channel with banks and sides. It must have a well defined and substantial existence.—Asbley vs. Walcott, 11 Cush. 192.

The proprietary interests of one man in the land of another is the "legal right" which the law requires the owner of land to so regard that it shall not be injured or destroyed in the use of property otherwise lawful. An analysis of the decisions relative to the obstruction of streams will show that they necessarily rest on this rule of servitude, creating,

so far as the bed of the stream is concerned, the "legal rights" of one man in the land of another man. The low grounds adjacent to a river, but outside of its well defined banks, do not owe any servitude to the waters resulting from rain, etc., in time of freshets, which do not flow within such banks, but which are found on such adjacent lands.

If such servitude is imposed by the law, it is perpetual in its obligations. It condemns these lands to unending slavery, as the receptacle of waste, irregular, useless and vagrant waters. It is a lasting prohibition to the improvement and utilization of such lands, and to any change, in lands themselves by which the capacity of such lands to hold the water will be decreased. It extends to lands in the city, and to those in the country. On the border of the river no factories or mills could be erected, or any other buildings. In the cities no wharves could be built, nor could the lands ever be raised by filling in earth so that the same could be useful for streets, stores and dwellings. The inhabitants in the lower part of a city could not be protected by levies from the inundations which would destroy their dwellings. In the country not only could no embankments or levees be raised, but the lowlands and marshes could not be filled up and made valuable for cultivation.

The present defendant may only at this time of the year be able to cultivate his property so as to make a living, and we believe it would be a harsh and arbitrary rule not to allow him to protect his property as he wishes. It may hurt the plaintiff, but public policy, and sound principles of equity demand he should suffer in a case like this. To protect himself the only remedy we can see is to construct a wall similar to that of the defendant's. For these various reasons, and principles of law, we believe the plaidtiff has no action. Plaintiff non-suited.

OPINION OF SUPREME COURT.

A stream is accustomed to flow in a certain channel. But the channel will have various widths, according to the amount of water flowing. In the dry season, it may be but twenty yards wide. In the wet, its width may be 100 yards. Not as many days of the year does the water cover 100 yards as over twenty, but the channel of the former width is nevertheless a customary channel.

A riparian owner has no right, it will be conceded, to narrow the 20 yards channel. Why then should he to narrow the 100 yards? It is as natural for the stream to be broad in the spring, as to be narrow after midsummer, and its waters in the former season should no less have free progress, than in the latter.

Building a levee or dyke within the 20 yards of the midsummer channel would force the water further upon the opposite shore, and the causation of this invasion of that shore, would be an actionable wrong to its owner. How is building of a levee within 100 yards of the spring channel, with a similar result, any the less a wrong?

No light is shed on the question by the conception of "surface water". The water of all rivers was once surface water. Water fell on wide tracts. So much of it as did not evaporate, or was not absorbed into the sail, poured over the inclined surfaces into the deeper depressions. These reticulated; the waters in the smaller channels united in the larger.

Hundreds of these larger channels converged into a creek, or a river. So, water, once in a stream, may overflow its banks, and inundate a tract of land, may lose its connection with the river whence it escaped, so that as its quantity lessens it will not run back thereinto. It is now again surface water; that is, water on the surface which does not form part of a stream; which will disappear if at all, only by evaporation or absorption into the soil.

When a stream, which in midsummer is only 20 yards wide, becomes in the spring 100 yards wide, it is no less a stream at the latter than it was at the former time. The large volume moves, flows, as the smaller did. Its channel is as unitary, as customary, and as well defined.

There may be extraordinary occasions, when water in sufficient quantities to fill a channel 150 yards wide, flows, and these may be so rare that it is wise not to require the riparian owner to respect them in his treatment of his banks. He may be allowed to reform these banks so as to confine the waters in a narrower channel, say one of 120 yards or 100 yards. But this policy would not extend to the toleration of a contraction of the width of the regular spring channel.

In the case before us, thaws had for some years back, regularly flooded the riparian lands. They occurred every spring. They were not so rare as to escape remembrance, or as to make provision for them seem fantastic and super-cautious. There is no sufficient reason for forbidding any narrowing of the 20 yard channel, while allowing the narrowing of the 100 yard channel.

Adamson's erection of the wall compelled the water to extend more widely over Barton's land. unless he erected a similar wall. Why should he be compelled to go to the expense of the construction, or to suffer this increased inundation? If he built a wall the effect of the straightening of the channel might be to cause expansions of the water over upper lands of others heretofore free, or to unduly retard the advance of the water over the riparian lands. Unforeseen difficulties are avoided by adopting the principle that the channel regularly, even if not constantly, occupied by a stream must not be narrowed by an owner of land, without the consent of other owners whose land will be affected detrimentally in consequence. Support of this principle may be found in 2 Farnham Waters, 1723; 3 Farnham 2563. Hartshorne v. Chaddock, 135, N. Y. 116; King v. Trafford, 1 Bar. & Ad. 874; R. R. Co. v. Brevoort, 25 L. R. A. 527; and others, cited by the learned counsel for the plaintiff.

Judgment reversed with v. f. d. n.

The Rationale of the Injunction, an article by Dr. Trickett, appears in the October number of the American Law Review. It criticizes certain extra-judicial *dicta* of Justice Brewer, of the Supreme Court of the United States, and points out the analogy between law making by the legislature and law making by the judges, and suggests the propriety of applying the constitutional safeguards thought proper in reference to the former, also to the latter.

Worthy of note is the fact that all the graduates of the Dickinson School of Law who took the recent final examination in July were successful.

EDITOR'S NOTE.

The name of the publication, which heretofore has been the "Forum," of the Dickinson School of Law, will be, with No. 1, of Volume XIII, the "Dickinson Law Review."

Articles of value to the practicing attorney, by members of the Faculty, as well as reviews of the latest legal publications, will appear in each of the several numbers.

A valuable feature of the Review will be the reports of decisions by members of the Faculty, together with briefs submitted by counsel, of cases, founded on recent legislation and involving important legal propositions.

Among the articles that will appear in the 1908-1909 series of the "Dickinson Law Review," are, "Sales By Sample," "Declarations On Will Cases," "Address of Counsel to Jury," "Liability of Railroad Companies for Negligently Caused Fires," "Reputation Evidence," "Improper Remarks by Counsel in Jury Trials," and "Refreshing Recollection."